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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ISLAMIC REPUBLIC OF IRAN,
Petitioner,
vs.
SHAMS PAHLAVI, aka H.I.H. PRINCESS SHAMS PAHLAVI; IERSPEX FINANCE N.V.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REASONS FOR DISREGARDING RESPONDENTS' OPPOSITION AND GRANTING THIS PETITION FOR WRIT OF CERTIORARI 1

I. The Significance of the Issue Presented for Review and the Implications of the Lower Courts' Rulings Warrant Granting the Petition for Writ of Certiorari 1

II. That the Algerian Accords and Act of State Doctrine are Supreme Federal Law Cannot Be Disputed or Refuted; Nor Can Their Incompatibility with California's Discovery Laws as Indisputably Indicated by Dismissal of Petitioner's Complaint 2

A. IRAN Has Urged the Supremacy of the Algerian Accords and the Act of State Doctrine Over California Discovery Laws Throughout This Action. Respondents' Contention that IRAN Recently Introduced a New Interpretation of the Algerian Accords Lacks Merit 3

B. The Intent of the Algerian Accords is Clear: THE DECREE Must be Enforced, and, IRAN's Claim May Not be Derailed by Incompatible State Discovery Law. 4

Page

III. Resolution of the Issue Presented for Review Changes the Outcome of This Case. The Lower Courts Agreed That No Independent Grounds Exist to Support the Decision Below 7

A. There is No Limitation Issue 8

B. There is No Unenforceable "Confiscation." 8

C. There was No Waiver. THE DECREE is a Valid Act of State 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Austin v. Massachusetts Bonding and Ins. Co.,
56 Cal.2d 596 (1961) 8

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 10

Bandes v. Harlow & Jones, Inc.,
852 F.2d 661 (2d Cir. 1988) 9

D'Angelo v. Petroleos Mexicanos,
331 A.2d 388 (Del. 1974) 10

Dore v. Thornburgh,
90 Cal. 64 (1891) 8

Islamic Republic of Iran v. Pahlavi,
62 N.Y.2d 474, 478 N.Y.S.2d 597,
467 N.E.2d 245 (1984), *cert. den.*,
469 U.S. 1108 (1985) 7

Islamic Republic of Iran v. Pahlavi,
160 Cal.App.3d 620,
206 Cal.Rptr. 752 (1984). 7

Islamic Republic of Iran v. Pahlavi,
473 N.Y.S.2d 801 (1984), *affd. mem.*,
486 N.Y.S.2d 939, 476 N.E.2d 338 (1985) 7

Maltina Corp. v. Cawy Bottling Co.,
462 F.2d 1021 (5th Cir. 1972), *cert. den.*,
409 U.S. 1060 (1972) 9

Page

National Petrochemical Company of Iran v. M/T Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988), *cert. den.* 489 U.S. 1081 (1989) 3

Republic of Iraq v. First National City Bank, 353 F.2d 47 (2nd Cir. 1965), *cert. den.* 382 U.S. 1027 (1966) 9

Underhill v. Hernandez, 168 U.S. 250 (1897) 10

United Bank Ltd. v. Cosmic International, Inc., 542 F.2d 868 (2d Cir. 1976) 9

United States v. Belmont, 85 F.2d 542 (2d Cir. 1936), *rev'd* 301 U.S. 324 (1937) 7, 8

United States v. Pink, 32 N.E.2d 552 (N.Y. 1940), *rev'd* 315 U.S. 203 (1942) 7, 8

W.S. Kirkpatrick & Co., Inc., et al. v. Environmental Tectonics Corp., International, 493 U.S. 400 (1990) 9

Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd., 840 F.2d 72 (D.C. Cir. 1988). 9

Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956) 9

Page

State Statutes

California Code of Civil Procedure
Section 343 8

Rules

United States Supreme Court Rule 10.1(c) 2

Legislative Hearings

Iran's Seizure of the United States Embassy: Hearings Before the House Committee on Foreign Affairs, 97th Cong., 1st Sess. (February 19, 1981) 6

PETITIONER'S REPLY BRIEF

REASONS FOR DISREGARDING RESPONDENTS' OPPOSITION AND GRANTING THIS PETITION FOR WRIT OF CERTIORARI

The turmoil which preceded the Algerian Accords is over. The responsibilities assumed, and obligations accepted, by the United States in adopting the Algerian Accords continue. Unless this Court confronts the seminal issue and enforces the Algerian Accords, IRAN will be irreparably prejudiced and Respondents' political propaganda (Opposition at 2-3) and misplaced reliance on politicians' rhetoric (Opposition at 7-8) will forever justify the dismissal of IRAN's Complaint in the minds of the lower court jurists that have ruled on this case to date.

I.

The Significance of the Issue Presented for Review and the Implications of the Lower Courts' Rulings Warrant Granting the Petition for Writ of Certiorari.

Uniformity of decision is not the issue. *Multiple* wrongs do not make a right. Prior omissions to recognize the intent of the parties to the Algerian Accords, and the implications thereof in related litigation, do not justify a decision by this Court to deny review.

The provisions of the Algerian Accords at issue in this case have general application. More cases of a similar nature have been filed (*e.g., Bank Melli Iran; Bank Mellat v. Shams Pahlavi, aka H.I.H. Princess Shams Pahlavi*, United States Court of Appeals for the Ninth Circuit, Case No. 94-55292). Similar cases will be filed in the future. The questions of

law involved here can also apply to future enforcement of treaties and executive agreements.

By inquiring into the significant interplay between an executive agreement and the act of state doctrine, as federal law, and state discovery law, this case is not the *sui generis* aberration Respondents portray. (Opposition at 3-5.) This case presents important questions of law under Supreme Court Rule 10.1(c).

II.

That the Algerian Accords and Act of State Doctrine are Supreme Federal Law Cannot Be Disputed or Refuted; Nor Can Their Incompatibility with California's Discovery Laws as Indisputably Indicated by Dismissal of Petitioner's Complaint.

Respondents cannot dispute or refute the supremacy of federal law, as set forth in the Algerian Accords and the act of state doctrine, over California's discovery laws. (Petition at 8-15.) The fact that IRAN's Complaint was dismissed shows the obvious incompatibility. The Algerian Accords do not allow the merits of THE DECREE to be questioned. This is evident not only from the provisions of the Algerian Accords, but from the United States Government's Suggestion of Interest (Petition, App. P.), and more importantly, from comments made by the United States' negotiator of the Algerian Accords.

A. IRAN Has Urged the Supremacy of the Algerian Accords and the Act of State Doctrine Over California Discovery Laws Throughout This Action. Respondents' Contention that IRAN Recently Introduced a New Interpretation of the Algerian Accords Lacks Merit.

IRAN's interpretation of the Algerian Accords' provision "in accordance with United States law" and its obvious deeper meaning has rightfully formed the foundation of IRAN's claim throughout this action. Respondents' attempt to characterize IRAN's justifiable interpretation of the Algerian Accords as a new argument, introduced on appeal for the first time, is not supported by the facts or Respondents' misinterpretation of *National Petrochemical Company of Iran v. M/T Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988), *cert. den.* 489 U.S. 1081 (1989).

IRAN's ability to proceed in United States courts predated the Algerian Accords. Respondents now challenge that ability. IRAN refutes Respondents' contention, purportedly based on *National Petrochemical, supra*, that the Algerian Accords, alone, provide IRAN access to United States courts.[1] In fact, Respondents acknowledge multiple avenues

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[1] The Brief filed on behalf of the United States government as *Amicus Curiae* in *National Petrochemical* clearly indicates the Executive Branch of the United States Government recognized the then government of IRAN on February 16, 1979, prior to adoption of the Algerian Accords. The United States Government's firm statement on the issue, which is in line with the *National Petrochemical* court's ultimate decision on the issue, refutes Respondents' bald assertion regarding the Accords.

The United States Government's *Amicus Curiae* brief stated, at page 9, in pertinent part: [footnote 10:]

See J. Hervey, *The Legal Effects of Recognition in International Law* 3 (1928) ("courts are unanimously agreed that recognition by the political departments of the government is binding upon the

(continued)

of access for IRAN to United States courts by discussing "traditional" and other "courses of action" by which IRAN can enforce its rights against the Shah and his close relatives. (Opposition at 7-8.)

B. The Intent of the Algerian Accords is Clear: THE DECREE Must be Enforced, and, IRAN's Claim May Not be Derailed by Incompatible State Discovery Law.

THE DECREE must be enforced. IRAN's claim must not be derailed by incompatibilities between California's

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(fn. continued)
courts. They cannot enter into an independent examination in order to determine for themselves which is the lawfully instituted government in a designated territory . . . .")

* * *

[full text:]

II. The Government of Iran and its Instrumentalities are Entitled to Access to U.S. Courts

The Executive Branch made a formal statement of recognition and instituted diplomatic relations with the first revolutionary government of Iran, that of Mehdi Bazargan, on February 16, 1979. On that date, State Department press spokesman Hodding Carter III stated as follows: [footnote 11 omitted]

> Our ambassador has relayed to the Government in Iran our intention to maintain diplomatic relations with that Government. This is the formal declaration that our relations do continue . . . . It [the Ambassador's statement] recognizes the government which is in power in Iran, which is headed by Prime Minister Bazargan. . . . We recognize that Government. They will have to say what the status of the Shah is.

discovery laws and the purpose and intent, whether obvious or implicit, of the Algerian Accords. (Petition, App. G, J.)

Respondents have introduced alternative interpretations of the Algerian Accords, and related implications thereof, while persisting with their interpretation that the Algerian Accords require discovery. (Opposition at 5-8.) Thus, Respondents explore the possibility of an ambiguity in the terms of the Accords.

The scope of the United States' obligations under the terms of the Algerian Accords, with respect to the return of the assets of the Shah and his close relatives to IRAN, is a highly-contentious issue. That issue must ultimately be decided by the Iran-United States Claims Tribunal considering the intent and positions of both governments during the negotiation of the Algerian Accords.

Respondents' position that state law discovery obligations bind IRAN is unfounded. The United States Government's position on that point is clear from sources including the Suggestion of Interest (Petition, App. P) and negotiators' statements.

Respondents reference statements made by the United States' negotiators of the Algerian Accords to support their position that enforcement of THE DECREE under the Algerian Accords requires compliance with California's discovery laws. (Opposition at 6-8.) However, a comment made by Mr. Warren Christopher, one of the United States' negotiators, shows how proper administration of the Algerian Accords supplants state discovery law.

Point IV, Paragraph 13 of the Algerian Accords, addresses the reporting of property in the United States owned by the Shah or his close relatives.[2] Mr. Christopher acknowledged

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[2] Paragraph 13 provides:

> 13. Upon the making by the Government of Algeria of the certification described in

(continued)

that the reporting mechanism within the Algerian Accords serves a function akin to, but different from, discovery.[3] If the United States Government did not intend for the Algerian Accords to supersede state discovery laws, why would the United States Government agree to Paragraph 13, effectively a vehicle to provide IRAN information which, as Mr. Christopher noted, could otherwise be derived through discovery?

Regardless of the conclusion one reaches after analyzing the implications of Mr. Christopher's comment, it remains clear that omission of discovery from the underlying proceedings does not deny due process to Respondents. The United States Government's Suggestion of Interest (Petition,

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(fn. continued)

> Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

[3] Mr. Christopher's exact words were:

> Once a close relative has thus been served in litigation, persons with information about property in the United States will be required to report it to the Treasury. I think most lawyers will recognize that the kind of information required to be furnished to the Treasury is the same kind of information that would be available to any diligent plaintiff in a lawsuit under our normal civil discovery procedures.

Iran's Seizure of the United States Embassy: Hearings Before the House Committee on Foreign Affairs, 97th Cong., 1st Sess. (February 19, 1981), 142.

App. P.) states Respondents' due process interests will be protected if they are afforded the opportunity to appear and respond to IRAN's allegations.

Considering these points, and the Government's analogy of this case to *United States v. Pink*, 32 N.E.2d 552 (N.Y. 1940), *rev'd* 315 U.S. 203 (1942), and *United States v. Belmont*, 85 F.2d 542 (2d Cir. 1936), *rev'd* 301 U.S. 324 (1937), the United States Government plainly intended the Algerian Accords to supersede state discovery laws. *Pink* and *Belmont* did not permit due process challenges to Soviet expropriations. This means enforcement of Soviet, or Iranian, expropriations conforms with due process of law.

Respondents' attempt to liken this case to prior litigation against the former Shah and his other relatives lacks merit and must fail. "[E]very other" case referred to by Respondents (Opposition at 3-4.) involved issues other than discovery obligations. Namely, in *Islamic Republic of Iran v. Pahlavi*, 160 Cal.App.3d 620, 206 Cal.Rptr. 752 (1984), the issue was exercise of personal jurisdiction. The other cases are *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. den.* 469 U.S. 1108 (1985); and *Islamic Republic of Iran v. Pahlavi*, 473 N.Y.S.2d 801 (1984), *affd. mem.*, 486 N.Y.S.2d 939, 476 N.E.2d 338 (1985), where the issues concerned application of the doctrine of *forum non conveniens*.

III.

Resolution of the Issue Presented for Review Changes the Outcome of This Case. The Lower Courts Agreed That No Independent Grounds Exist to Support the Decision Below.

A. There is No Limitation Issue.

Respondents' contention that IRAN's claim is barred by the statute of limitation in California Code of Civil Procedure Section 343 and does not relate back to IRAN's original Complaint (Opposition at 2, 11) is meritless. Respondents raised the same argument in a Demurrer which was overruled. (Petition at 4.) As before, Respondents' reliance on California Code of Civil Procedure Section 343 and *Dore v. Thornburgh*, 90 Cal. 64 (1891), is misplaced. Respondents' authority, and the other authorities to support their conflicting statute of limitation arguments do not apply to an action brought under an executive agreement and supported by the act of state doctrine. Moreover, THE DECREE constitutes a *continuing* act of state.

IRAN's original Complaint, First Amended Complaint, and Second Amended Complaint, each sought to enforce the same rights contemplated by THE DECREE. Therefore, IRAN's Second Amended Complaint relates back to the original Complaint. *Austin v. Massachusetts Bonding and Ins. Co.*, 56 Cal.2d 596 (1961).

B. There is No Unenforceable "Confiscation."

Respondents' contention that IRAN's claim relies on an unenforceable confiscation also lacks merit. (Opposition at 10-11.) Respondents also raised this argument in their Demurrer and the argument was rejected when the trial court overruled the Demurrer. (Petition at 4.) For the reasons stated above, THE DECREE is not confiscatory. This case is analogous to *United States v. Pink, supra*, and *United States v. Belmont, supra*. (Petition, App. P.) The cases Respondents

cite concerning unenforceable confiscations are all distinguishable.[4]

C. There was No Waiver. THE DECREE is a Valid Act of State.

Respondents also contend IRAN waived its right to raise the act of state doctrine based on IRAN's failure to specifically reference the act of state doctrine in its objections to the underlying discovery. (Opposition 2, 10-11). This contention lacks merit. IRAN objected in writing to the discovery requests based on the Algerian Accords. When Respondent PAHLAVI moved to compel discovery responses from IRAN, and later to dismiss IRAN's Second Amended Complaint, IRAN included the act of state doctrine argument in its oppositions. (Petition, App. K, L.)

Respondents failed to raise to the lower courts, either in their papers or during oral argument, any perceived waiver of the act of state doctrine by IRAN. For these and other reasons, Respondents have waived their argument that IRAN waived its right to raise the act of state doctrine.

Further, IRAN's discovery objections were clearly based on the Algerian Accords. As an executive agreement, the

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[4] None of the cases involve executive agreements or treaties commanding enforcement of foreign decrees or judgments. *See W.S. Kirkpatrick & Co., Inc., et al. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990); *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. den.*, 382 U.S. 1027 (1966); *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661 (2d Cir. 1988); *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72 (D.C. Cir. 1988); *United Bank Ltd. v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021 (5th Cir. 1972), *cert. den.*, 409 U.S. 1060 (1972); *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956). *Republic of Iraq, supra*, expressly refused to enforce an Iraqi act due to the absence of an executive agreement or treaty.

Algerian Accords clearly constitute acts of both the United States Government and IRAN's government. These sovereign acts, in issuing THE DECREE and negotiating and signing the Algerian Accords, qualify as acts of state under *Underhill v. Hernandez*, 168 U.S. 250 (1897), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Thus, IRAN's discovery objections based on the Algerian Accords foreclose Respondents' waiver argument. IRAN further ratifies THE DECREE as an act of state by pursuing this enforcement action.

Respondents' efforts to thwart application of the act of state doctrine fall flat. Respondents' reliance on *D'Angelo v. Petroleos Mexicanos*, 331 A.2d 388, 392 (Del. 1974), is misplaced. *D'Angelo* is clearly distinguishable from the instant case. *D'Angelo* concerned a challenge to subject matter jurisdiction premised on an act of state defense in a Delaware civil action. The act of state is not here and cannot be used as a *defense* to a claim based on the Algerian Accords. (Petition, App. G.)

CONCLUSION

For the foregoing reasons, and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Dated: November 2, 1994.

Respectfully submitted,

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